IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No. 78 of 1991

For Approval and Signature:

THE HON'BLE MISS JUSTICE R.M.DOSHIT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 of any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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HASMUKHBHAI BHIKHABHAI - Petitioner(s)

Versus

KACHHIA CHANDULAL KUBERDAS - Respondent(s)

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Appearance :
MR HM PARIKH for Petitioner No(s).: 1.
MR SHITAL PATEL for MR AJ PATEL for Respondent No(s).: 1.
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CORAM :THE HON'BLE MISS JUSTICE R.M.DOSHIT

Date : 21/06/2005

ORAL JUDGMENT

Feeling aggrieved by the judgment and order dated 29th November, 1990 passed by the learned Joint District

Judge, Nadiad in Civil Appeal No.172/1985, the appellant (defendant in Civil Suit No.99/1983) has preferred the present Revision Application under Section 29(2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter referred to as "**the Rent Act**").

This litigation has a chequered history which requires to be recorded in so far as it is relevant to note. The parties to the suit were the real brothers. Both the brothers started a partnership business in or around the year 1952. During the subsistence of the partnership business the plaintiff purchased shop no.108 at Umreth. The partnership business was continued up to the year 1972. In or around the year 1972 the partnership was dissolved. The shop no.108 remained in possession of the defendant. One another shop no.100 remained in possession of the plaintiff. The plaintiff instituted Civil Suit No.174/1977 in the Civil Court at Umreth for declaration of title and for recovery of possession of the suit shop no.108. The said suit was contested by the defendant. According to the plaintiff the suit shop no.108 was of his exclusive ownership and on dissolution

of the partnership the defendant was permitted to occupy the suit shop no.108 temporarily. The said suit was dismissed by the Civil Court. However, in Civil Appeal No.42/1982 before the District Court, the suit for declaration of title was decreed. As to the relief of possession the appellate court held that the defendant was tenant in the suit shop no.108. In view of the landlord and tenant relationship between the parties the Civil Court had no jurisdiction to pass decree for possession. Such jurisdiction was vested in the rent court alone. The said judgment (Exh.80) was confirmed by this Court on 21st February, 1983 in Second Appeal No.203/1983.

After the dismissal of the said Second Appeal, the plaintiff instituted Civil Suit No.99/1983 in the Court of Civil Judge (J.D.), Umreth for recovery of possession of the suit shop no.108 on the ground of non-payment of rent. The suit was contested by the defendant vide his written statement (Exh.24). The defendant denied that he was the tenant in the suit shop. The learned Civil Judge, by judgment and decree dated 31st August, 1985, held that the defendant was tenant in default and passed decree for

possession under Section 12(3)(a) of the Rent Act. Feeling aggrieved, the defendant preferred Civil Appeal No.172/1985 in the Court of District Judge, Kheda. The said Appeal came to be dismissed on 7th December, 1987. The said order was confirmed by this Court on 4th February, 1988 in Civil Revision Application No.1326/1987. Feeling aggrieved, the defendant preferred appeal before the Hon'ble Supreme Court. The said Appeal was allowed by order dated 29th March, 1988. The Hon'ble Supreme Court set-aside the judgment and order of the High Court and the case was remanded to the High Court **"for fresh decision on the points arising in this case and if the High Court considers it necessary to obtain a finding of the trial Court on any point it is open to the High Court to call for a finding and thereafter dispose of the matter in accordance with law."** Pursuant to the said order the Civil Revision Application No.1326/1987 stood revived. By judgment and order dated 15th October, 1989 (Coram: B.S.Kapadia, J.) the Revision Application was allowed. By consent of the parties and in view of the order made by the Supreme Court in Civil Appeal the order passed by the lower appellate Court on 7th

December, 1987 in Regular Civil Appeal No.172/1985 was set-aside. The District Court was directed "**to hear the appeal afresh after receiving the finding from the trial Court on the issue, whether appellant Kachhia Bhikhabhai Kuberdas of Umreth who was defendant in Regular Civil Suit No.99/1983 was tenant of suit shop bearing city survey no.108 sheet no.20/294 admeasuring 24 sq.yards situated at Gandhisheri of Umreth in Kaira District.**"

Pursuant to the said order the above referred Civil Appeal No.172/1985 stood restored to the files of the lower appellate Court. The lower appellate Court remanded the matter to the trial Court for decision on the issue, "**whether the defendant was the tenant in the suit shop no.108**". After the said remand, by order dated 22nd January, 1990 the learned Civil Judge held that the plaintiff had failed to establish landlord-tenant relationship between the plaintiff and the defendant. The said finding was reversed by the lower appellate Court by impugned judgment and order dated 29th November, 1990. The lower appellate Court was pleased to hold that the defendant was the tenant in the suit shop no.108 and was

the tenant in default. The lower appellate Court, therefore, passed decree for eviction against the defendant under Section 12(3)(a) of the Rent Act. Therefore, the present Revision Application.

Mr.Parikh has submitted that the lower appellate Court has erred in holding that the defendant was the tenant in the suit shop no.108. He has submitted that except the bare statement made by the plaintiff there is no evidence in support of the landlord and tenant relationship. He has submitted that evidently on dissolution of the partnership the suit shop no.108 came to the share of the defendant. Another shop no.100 went to the share of the plaintiff. Thus, there was no occasion for the plaintiff to create tenancy in favour of the defendant. He has submitted that the lower appellate Court is unduly guided by the judgment of Civil Appeal No.42/1982. The finding of tenancy recorded by the lower appellate Court is not supported by the evidence on record.

The Revision Application is contested by Mr.Patel. He has submitted that in Civil Appeal No.42/1982 the

appellate Court categorically recorded that the defendant was the tenant of the plaintiff. The said finding recorded by the lower appellate Court was confirmed by this Court in Second Appeal. The said finding has thus become final and shall act as res judicata in the present case. He has also submitted that pending the proceeding, on several occasions the defendant did admit that he was the tenant in the suit shop. He has submitted that pending the suit the plaintiff took out application (Exh.13) for determination of standard rent of the suit shop. The said application was contested by the defendant vide his reply (Exh.15). The said reply and the order made below Exh.13 establish that the defendant had admitted that he was a tenant in the suit shop. He has also submitted that there is one more circumstance which establishes the tenancy in the suit shop. He has submitted that in his oral evidence (Exh.84) the defendant did admit that he was a tenant in the suit shop no.108 and was ready and willing to pay the amount of arrears of rent. Mr.Patel has relied upon the application dated 17th January, 1990 made by the plaintiff to the District Magistrate. He has submitted that in the said

application the defendant categorically stated that he was the tenant in the suit shop no.108 and that he had apprehension of assault on his person at the hands of the plaintiff. Mr.Patel has also relied upon the suit notice (Exh.48). He has submitted that in the said notice also the plaintiff categorically stated that the defendant was the tenant in the suit shop. He has submitted that the lower appellate Court has rightly held the defendant to be a tenant in the suit shop no.108. The impugned judgment does not call for interference by this Court in exercise of its revisional jurisdiction.

In Civil Appeal No.42/1982 the appellate Court held that the suit shop no.108 was of the ownership of the plaintiff and was not the property of the partnership firm as alleged by the defendant. As to the relief of recovery of possession of the suit shop, the learned Judge relied upon suit notice (Exh.27 in Civil Suit No.194/1977) and held that in the suit notice the plaintiff had stated that the defendant was the tenant in the suit shop no.108. The plaintiff having said thus the learned Judge held that in view of the said plea taken by

the plaintiff the suit for possession could not be decreed by the Civil Court. Such decree could be passed by the rent court alone. It is evident that the said observation had been made by the learned Judge relying upon the suit notice (Exh.27) and was not a finding recorded by the learned Judge on appreciation of evidence on record. In spite of the plea of ownership raised by the defendant the trial Court had not framed issue in connection with the nature of possession of the defendant of suit shop no.108. The question whether the plaintiff had established the landlord-tenant relationship between himself and the defendant was not directly and substantially in issue. I am of the opinion that the observation made by the learned Judge would not act as res judicata in the present case. There is one more reason why the said observation cannot act as res judicata. As recorded herein above, the matter had been carried up to the Hon'ble Supreme Court and the Hon'ble Supreme Court had remanded the matter specifically with a direction to the High Court for fresh decision on the points arising in the case and, if necessary, to obtain the finding of the trial Court. Pursuant to the said

order both the parties consented before this Court for remand of the case to the lower appellate Court with a specific direction to hear the appeal afresh after receiving the finding from the trial Court on the issue as to whether the defendant was the tenant in the suit shop no.108. In view of the aforesaid order of the Hon'ble Supreme Court and the order of the High Court and the consent given by the parties, the plaintiff is prevented from falling back on the observation made by the appellate Court in Civil Appeal No.42/1982 and to press the bar of res judicata.

As to the statement made by the defendant in application made to the District Magistrate, it should be noted that the said application is not received in evidence. Even otherwise, such statement should not amount to admission of a status of tenant by the defendant. The defendant's readiness to deposit the amount of arrears of rent pending the trial also would not amount to admission made by him as argued by Mr.Patel. It should be noted that the defendant's plea that the suit shop no.108 was of the ownership of the

partnership firm was negatived by the appellate Court in Civil Appeal No.42/1982. In the said appeal the Court also observed that the defendant was the tenant in the suit shop no.108. The Second Appeal preferred by the defendant was dismissed in limine. If in view of the said judgment pending the proceedings the defendant had referred himself as a tenant in the suit shop no.108 or had expressed his willingness to pay or deposit the rent with a view to saving his possession, the same also would not amount to admission made by the defendant.

Considering the evidence on record the trial Court has held that the plaintiff had failed to establish the relationship of landlord and tenant. The lower appellate Court, however, reversed the said finding solely on the basis of the observation made by the appellate Court in Civil Appeal No.42/1982. The lower appellate Court has not examined the evidence independent of the said observation made in Civil Appeal No.42/1982.

As to the evidence on record, it is indisputable that though the plaintiff urged that the defendant was

the tenant for monthly rent of Rs.150=00, he has not been able to establish the same. No rent note was executed by the defendant. Nor was any rent ever paid by the defendant all these years. Apart from the rent note and the payment of rent or the rent receipts, there is no other evidence to establish landlord-tenant relationship alleged by the plaintiff. I am, therefore, of the opinion that the lower appellate Court has erred in holding that the defendant was the tenant in the suit shop no.108 and in passing decree for eviction under Section 12(3)(a) of the Rent Act.

In view of the above discussion, the Revision Application is allowed. The judgment and order dated 29th November, 1990 passed by the joint District Judge, Nadiad in Civil Appeal No.172/1985 is quashed and set-aside. The Regular Civil Suit No.99/1983 instituted by the plaintiff stands dismissed. Rule is made absolute. The parties shall bear their own cost.

(Ms. R.M.DOSHIT, J.)

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